

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,) 3:05-CR-00085-ECR-RAM
6 Plaintiff,)
7) **ORDER**
8 vs.)
9 JAMES WILLIAM LONDO,)
10 Defendant.)

11 Defendant has moved (#293) pursuant to Fed. R. Crim. P. 29(c)
12 for a new trial or judgment of acquittal. Defendant also filed
13 Notice of Supplemental Authority (#295), Defendant's Supplement to
14 Notice of Supplemental Authorities (#301), and a Response (#307) to
15 the Government's Supplemental Memorandum.

16 The Government has also responded as required by the orders of
17 the Court.

18 The Government's evidence at trial was clearly sufficient,
19 when viewed in a light most favorable to the Government, so that a
20 rational trier of fact could have found Defendant guilty on both
21 Counts of the Indictment. As outlined in the Government's brief
22 (#300), the Government's evidence, if believed, was sufficient to
23 enable any rational trier of fact to find each of the essential
24 elements of each of the Counts of the Indictment beyond a
25 reasonable doubt. The issue of credibility was for the jury. The
26 Government's evidence was sufficient to show beyond a reasonable
27 doubt that the Government did not induce the Defendant into
28 committing a crime involving a greater quantity of methamphetamine

1 than he was predisposed to commit and that the Defendant was
2 predisposed to commit the charged crimes with the charged
3 quantities independent of and before coming in contact with the
4 Government agents.

5 The interests of justice do not require the granting of a new
6 trial.

7 The jury verdicts were not inconsistent as to the amount of
8 methamphetamine involved. The verdicts in the two Counts call for
9 separate findings by the jury, in the one Count actual
10 methamphetamine weighing 50 grams or more and in the other Count a
11 mixture and/or substance with a detectible amount of
12 methamphetamine weighing 50 grams or more. The same batch could,
13 and in this case did, contain both 50 grams or more of actual
14 methamphetamine and a mixture containing a detectible amount of
15 methamphetamine weighing 50 grams or more.

16 During the trial, the Defendant sought to introduce certain
17 personnel records of the witness Chris Pitzer through Maxine Cortes
18 and Matthew Fisk, the present and former administrators of the
19 Carson City Judicial Court. Mr. Pitzer was previously employed by
20 that court. According to the argument presented to the Court at
21 trial, the purpose of the documents was to impeach Mr. Pitzer and
22 to show his motives by evidence of bias and prejudice in favor of
23 the Government, in some sense his need to redeem himself by his
24 conduct related to Defendant.

25 The documents consisted of:

26 (a) Mr. Pitzer's medical leave records;
27 (b) Mr. Pitzer's letter of resignation;

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1 (c) A deal brokered for Mr. Pitzer to resign rather than to
2 be fired.

3 The deal permitting Mr. Pitzer to resign related to an
4 Internal Affairs investigation which showed that Mr. Pitzer had
5 been misusing government property, approximately \$10,000 worth of
6 ammunition, in an attempt to secure a job with a special operation
7 out of New York. Several officers had gotten caught up in the
8 situation. They identified firearms transactions to try to get a
9 job. Their activities put the Carson City Justice Court at risk
10 and they were found to be in violation of city regulations and
11 state law.

12 At trial, the Court rejected the documents finding that the
13 documents would not show bias or prejudice toward the Government;
14 that the evidence was just too remote, too indirect to indicate
15 bias or prejudice toward the Government, a need somehow for Mr.
16 Pitzer to want to redeem himself by misconduct relating to
17 Defendant. The Court found there was an insufficient nexus between
18 the documents and bias and prejudice of the witness toward the
19 Government to permit use of the documents for that purpose. The
20 Court also found the documents were much more prejudicial than
21 probative under Fed. R. Ev. 403. The Court did not reject the
22 documents for violation of Fed. R. Ev. 608(b).

23 The developing jurisprudence under Fed. R. Ev. 608(b) and some
24 related rules appear to cast doubt on the survival of the
25 longstanding common law rule which prohibits impeachment of a
26 witness on a collateral matter. Thus under *Slovik v. Yates*,
27 ___F.3d___, No. 06-55867, 2008 WL 4459083 (9th Cir. Oct. 6, 2008),
28 the trial court should have allowed the use of extrinsic documents

1 to cross examine a witness to show he was on probation when he had
2 testified that he was not on probation.

3 Whether Mr. Slovik was on probation was a collateral matter.
4 Counsel did not seek to bring in the documents showing he was on
5 probation to impeach his credibility because he was on probation
6 (which would not of itself be a basis for impeachment), but to show
7 he had lied under oath on direct examination and therefore was less
8 worthy of belief. This evidence would directly contradict his
9 testimony.

10 The *Slovik* case did not consider the issue of impeachment on a
11 collateral matter but only the question of evidence as to whether
12 the witness had lied under oath and impeachment on that basis.

13 Other cases developing under Rule 608(b) have analyzed this
14 problem.

15 In *U.S. v. Castillo*, 181 F.3d 1129 (9th Cir. 1999), the court
16 considered impeachment by contradiction. Extrinsic evidence was
17 proper to show specific testimony was false because it contradicted
18 a broad disclaimer of misconduct. Such a disclaimer the Court
19 found could open the door to such extrinsic evidence even though
20 the contradicting evidence was otherwise inadmissible under Fed. R.
21 Ev. 404 and 608(b). In *Castillo*, a broad disclaimer of misconduct
22 was not merely collateral but also important to the witness
23 credibility.

24 In *U.S. v. Hinkson*, 526 F.3d 1262 (9th Cir. 2008), the Court
25 indicates that extrinsic evidence that the principal Government
26 witness had not received the purple heart would be admissible to
27 contradict his implied statement that he had received this
28 decoration because he wore a purple heart pin in his lapel while on

1 the witness stand. This was treated as non-verbal conduct intended
2 as an assertion of fact. In *Hinkson*, the fact that the witness had
3 received the purple heart was not merely a collateral matter but
4 important to the substance of the testimony he offered at the
5 trial.

6 In the case at bar, the extrinsic documents sought to be used
7 (as analyzed elsewhere in this order) were presented to impeach the
8 witness Mr. Pitzer for bias and prejudice toward the Government.
9 There was no nexus between the evidence and proof of bias or
10 prejudice toward the Government. The documents were offered to
11 impeach the witness on a collateral matter.

12 The issue of extrinsic evidence of pure contradiction of a
13 witness testimony on a collateral matter or of impeachment by
14 showing a witness lied under oath as to a collateral matter has not
15 been explored significantly in the cases.

16 The court in *Slovik* (which is a habeas corpus case addressing
17 a state conviction) did not address the issue of impeachment on a
18 collateral matter. It considered the issue of direct contradiction
19 of the witness testimony and impeachment on the basis that he had
20 lied under oath under the confrontation clause of the United States
21 Constitution. The Court held that there was a Sixth Amendment
22 right to contradict a witness' testimony to show a prototypical
23 form of bias. It does not appear that the rule prohibiting
24 impeachment on a collateral matter is repealed in *Slovik*. Had the
25 issue been considered in *Slovik* on the basis of impeachment on
26 collateral matter it may have been decided differently.

27 The testimony of Mr. Pitzer did not contain any broad
28 disclaimers of misconduct in the evidence or testimony. Mr. Pitzer

1 was called as a defense witness and no inquiry of that broad a
2 nature was made or responded to.

3 The relevant testimony of Mr. Pitzer included:

4 (1) That his decision to leave the Carson City Alternative
5 Sentencing Department was voluntary.

6 (2) That in at least one instance, when he was directed by
7 the Carson City Judicial Department to arrest a drug
8 trafficker, he did not do so.

9 The Carson City Judicial Department personnel documents sought
10 to be used through Maxine Cortes and Matthew Fisk were
11 contradictory to the testimony of Mr. Pitzer's as set forth above.

12 The testimony of Mr. Pitzer on each instance was as to a
13 collateral matter. The decision to leave the Alternative
14 Sentencing Department of the Carson City Judicial Department while
15 under threat of termination did not show bias or prejudice for the
16 Government as argued by defense counsel. The refusal to arrest a
17 drug trafficker on a different independent occasion did not show
18 that Mr. Pitzer was biased or prejudiced toward the Government and
19 did not relate to any matter material to the issues in the case or
20 show that Mr. Pitzer was untruthful in his testimony.

21 The proposed evidence in the case at bar raised problems of
22 unfair prejudice against the Government and had little probative
23 value as to the credibility of Mr. Pitzer. We so found in
24 rejecting the documents during the trial. Fed. R. Ev. 403 provided
25 that basis to reject the use of the documents.

26 Fed. R. Ev. 611 is also a factor in the mix. The introduction
27 of these documents raised a problem of an independent separate
28 significant issue relating to the personnel problems of Mr. Pitzer.

1 This would conceivably have focused the jury on Mr. Pitzer rather
2 than on the Defendant's conduct and required evidence from both
3 sides as to whether Mr. Pitzer had really done the things of which
4 he was accused.

5 We do not conclude that the law has rejected the collateral
6 impeachment rule. The *Slovik* case is somewhat difficult to
7 distinguish. However, *Slovik* is not decided with reference to Rule
8 608(b), but rather under the confrontation clause of the
9 Constitution. The *Slovik* case largely addresses the improper
10 limitation on cross examination as per *Davis v. Alaska*, 415 U.S.
11 408, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and Fed. R. Ev.
12 611.

13 We also consider in light of the evidence presented at trial
14 whether, if the rejection of the use of these documents was error,
15 then whether the error was harmless.

16 In light of the very substantial evidence in the case against
17 Defendant, had this evidence been received would a reasonable jury
18 have still found the Defendant guilty. We ask in the language of
19 *Slovik* would the jury have viewed Mr. Pitzer's testimony in a
20 different light so that they would not have found a guilty verdict.

21 Mr. Pitzer's testimony offered at trial did not prove to be of
22 great significance. He offered little to support the defense case.
23 Simply having impeached him was not an important aspect of the
24 case.

25 Unlike the witness in *Slovik*, Mr. Pitzer (although he might
26 have been considered an important witness for the defense) was not
27 the only witness for the defense with respect to his activities and
28 credibility and unlike *Slovik*, Mr. Pitzer was not the only witness

1 for the Government, in fact he was not a witness for the Government
2 at all.

3 Other evidence relating to Mr. Pitzer's credibility was
4 presented by the defense through Kimberly Blackwood and Mr. Fisk.
5 Impeaching Mr. Pitzer with the use of the subject documents would
6 not have shown a motive to favor the Government.

7 As the late Judge Joseph Sneed was heard to say, we are
8 looking for fair trials and do not insist on perfect trials.

9 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant's Motion
10 (#293) for a new trial or for judgment of acquittal pursuant to
11 Fed. R. Crim. P. 29(c) is **DENIED**.

12 Dated this 1st day of December, 2008.

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UNITED STATES DISTRICT JUDGE
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